

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA

STATE OF NORTH DAKOTA, <i>et</i>	)	
<i>al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	Civil No. 3:15-cv-00059-PDW-ARS
v.	)	
	)	
U.S. ENVIRONMENTAL	)	
PROTECTION AGENCY, <i>et al.</i> ,	)	
	)	
Defendant.		

---

**PLAINTIFF STATES' STATUS REPORT**

---

Plaintiff State of North Dakota, the other Plaintiff States<sup>1</sup>, and Plaintiff-Intervenor, the Governor of the State of Iowa, Kimberly K. Reynolds (collectively, the “Plaintiff States”), respectfully submit this Status Report in response to this Court’s June 24, 2020 Order staying this action and requiring a status report from Plaintiff States every 90 days. ECF No. 325. Plaintiff States respectfully request that the Court continue the stay of this action pending final resolution of litigation in multiple forums (the “Related Litigation”) challenging the U.S. Environmental Protection Agency’s and the U.S. Army Corps of Engineers’ (collectively

---

<sup>1</sup>Alaska, Arizona, Arkansas, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming.

“Agencies”) final rules entitled: “Definition of Waters of the United States—Recodification of Pre-Existing Rules,” 84 Fed. Reg. 56,626 (October 22, 2019) (“Recodification Rule”); and “Navigable Waters Protection Rule: Definition of ‘Waters of the United States,’” 85 Fed. Reg. 22,250 (April 21, 2020) (“2020 WOTUS Rule”). The Related Litigation seeks, in various forms, to either: (1) vacate the Recodification Rule and the 2020 WOTUS Rule nationwide and reinstate the 2015 WOTUS Rule that is the subject of this action; or (2) enjoin all or part of the Recodification Rule or 2020 WOTUS Rule.

### **STATUS REPORT**

Since this Court’s Order granting the stay, and Plaintiff States’ last Status Report filed on June 21, 2021, the Related Litigation remains active with the potential to reinstate the 2015 WOTUS Rule at issue in this action:

1. As noted in the June 21, 2021 Status Report, the Agencies had filed, or planned to file, motions in select active forums requesting that those courts remand the 2020 WOTUS Rule to the Agencies without vacatur. Since the June 21, 2021 Status Report, the Agencies’ motions for remand without vacatur have been granted in the following forums: *Conservation Law Found. v. EPA*, 20-cv-010820 (D. Mass.) (Memorandum and Order of Remand and Dismissal (ECF No. 122 (September 1, 2021))); *Murray v. Wheeler*, 19-cv-1498 (N.D. N.Y.) (Text Order remanding the 2020 WOTUS Rule without vacatur (ECF No. 46 (September

7, 2021)); *California v. Wheeler*, 20-cv-03005 (N.D. Cal.) (Order Granting Motion to Remand (ECF No. 271 (September 16, 2021)) (noting that the need to reach the request for vacatur was moot).

2. The following case seeking to vacate the Recodification Rule and 2020 WOTUS Rule, and reinstate the 2015 WOTUS Rule, remains active. *Pascua Yaqui Tribe v. EPA*, 4:20-cv-00266 (D. Ariz.). In this case, the Court granted the Agencies' motion for remand, while separately vacating the 2020 WOTUS Rule. *Id.*, Order, ECF No. 99 (August 30, 2021). In the Order, the Court left open for consideration Plaintiffs' challenges to the Recodification Rule pending additional briefing, including ordering the parties to submit a proposal for further briefing on the Recodification Rule by September 29, 2021. *Id.* at 11. The effect of the Order is that the pre-2015 WOTUS Rule regulations are in effect in that forum, while an additional ruling could subsequently invalidate the Recodification Rule and reinstate the 2015 WOTUS Rule.

3. In response to the *Pascua Yaqui Tribe v. EPA* Order, on September 3, 2021, the Agencies announced that they "have halted implementation of the [2020 WOTUS Rule] and are interpreting "waters of the United States" consistent with the pre-2015 regulatory regime until further notice." *See* Current Implementation of Waters of the United States (available at: <https://www.epa.gov/wotus/current-implementation-waters-united-states>).

4. The following cases are still pending a decision on the Agencies' motions for remand without vacatur. *See Navajo Nation v. Wheeler*, 2:20-cv-00602 (D.N.M. June 22, 2020) (merits briefing has been stayed pending resolution of the Agencies' opposed motion for remand (*see* ECF No. 32 (Opposed Motion to Remand to Agency (June 22, 2021))); ECF No. 33 (Order Placing Briefing Schedule in Abeyance) (June 24, 2021)); *S.C. Coastal Conservation League v. Wheeler*, 20-cv-01687 (D. S.C.) (per the Court's order modifying the scheduling order, the Agencies must file their motion to remand without vacatur by September 29, 2021 (ECF No. 53 (September 1, 2021))); *Env'tl. Integrity Project v. EPA*, 1:20-cv-01734 (D.D.C. June 25, 2020) (per the Court's July 28, 2021 Minute Order setting a briefing schedule on a motion to remand, briefing will conclude on September 17, 2021).

5. The following cases challenging the Recodification Rule remain in abeyance (or have been placed in abeyance since the last June 21, 2021 Status Report as noted below) pending the outcome of ongoing challenges to the 2020 WOTUS Rule and the Agencies' current rulemaking efforts: *Colorado v. EPA*, 20-cv-01461 (D. Col.) (The case was administratively placed in abeyance by joint motion of all parties (ECF No. 112 (July 14, 2021))); *S.C. Coastal Conservation League v. Wheeler*, 2:19-cv-03006 (D. S.C.); *Wash. Cattlemen's Assoc. v. EPA*, 19-cv-00569 (W.D. Wash.); *N.M. Cattle Growers' Assoc. v. EPA*, 19-cv-00988

(D. N.M.); *Chesapeake Bay Found. v. Wheeler*, 1:20-cv-1063 consolidated with 1:20-cv-1064 (D. Md.) (stayed on February 2, 2021); *Or. Cattlemen's Assoc. v. EPA*, 19-cv-00564 (D. Or.); *Puget Soundkeeper v. EPA*, 2:20-cv-950 (W.D. Wash).

### **CONCLUSION**

The Related Litigation, which is the basis for the current stay of this action, remains active and has not been fully resolved. While some forums have remanded the 2020 WOTUS Rule to the Agencies without vacatur, one forum has vacated the 2020 WOTUS Rule and is still considering requests to vacate the Recodification Rule and reinstate the 2015 WOTUS Rule at issue in this action. Therefore, Plaintiff States respectfully request that this Court continue to stay this case pending resolution of the Related Litigation. Plaintiff States will file their next status report by December 20, 2021.

Dated: September 20, 2021

Respectfully submitted,

State of North Dakota  
WAYNE STENEHJEM  
Attorney General

State of Alaska  
TREG TAYLOR  
Attorney General

/s/ Paul M. Seby  
Paul M. Seby  
Special Assistant Attorney General  
Greenberg Traurig, LLP  
1144 15<sup>th</sup> Street Suite 3300  
Denver, CO 80202  
Telephone: (303) 572-6584  
sebyp@gtlaw.com

/s/ Jennifer Currie (with permission)  
Jennifer Currie  
Assistant Attorney General  
1031 W. 4<sup>th</sup> Ave., Suite 200  
Anchorage, AK 99501  
Telephone: (907) 269-5278  
jennifer.currie@alaska.gov

*Attorneys for Plaintiff State of Alaska*

Jennifer L. Verleger  
Margaret I. Olson  
Assistant Attorneys General  
Office of Attorney General  
500 N. 9th Street  
Bismarck, ND 58501  
Phone: (701) 328-2925  
wstenehjem@nd.gov  
jverleger@nd.gov  
maiolson@nd.gov

*Attorneys for Plaintiff State of North  
Dakota*

State of Arizona  
MARK BRNOVICH  
Attorney General

/s/ Robert J. Makar (with permission)

Robert J. Makar  
Assistant Attorney General  
Office of the Arizona Attorney General  
2005 N. Central Avenue  
Phoenix, AZ 85004-2926  
Telephone: (602) 542-8540  
Robert.Makar@azag.gov

*Attorneys for Plaintiff State of Arizona*

State of Arkansas  
LESLIE RUTLEDGE  
Attorney General

/s/ Nicholas Bronni (with permission)

Nicholas J. Bronni  
Arkansas Solicitor General Arkansas  
Attorney General's Office  
323 Center Street, Suite 200  
Little Rock, AR 72201  
Telephone: (501) 682-6302  
Facsimile: (501) 682-8118  
nicholas.bronni@arkansasag.gov

*Attorneys for Plaintiff State of Arkansas*

State of Idaho  
LAWRENCE WASDEN  
Attorney General

/s/ Mark Cecchini-Beaver (with permission)

Mark Cecchini-Beaver  
Deputy Attorney General  
Office of the Attorney General  
Environmental Quality Section  
1410 N. Hilton, 2nd Fl.  
Boise, Idaho 83706  
Telephone: (208) 373-0494  
Facsimile: (208) 373-0481  
Mark.Cecchini-Beaver@deq.idaho.gov

*Attorneys for Plaintiff State of Idaho*

State of Iowa  
KIMBERLY K. REYNOLDS  
Governor of the State of Iowa

THOMAS J. MILLER  
Attorney General of Iowa

/s/ David S. Steward (with permission)  
DAVID S. STEWARD

JACOB J. LARSON  
Assistant Attorneys General  
Environmental Law Division  
Hoover State Office Building  
1305 E. Walnut Street, 2<sup>nd</sup> Fl.  
Des Moines, Iowa 50319  
Telephone: (515) 281-5164  
Facsimile: (515) 281-6771  
david.steward@ag.iowa.gov  
jacob.larson@ag.iowa.gov

*Attorneys for Plaintiff-Intervenor,  
Kimberly K. Reynolds, Governor of the  
State of Iowa*



State of Missouri  
ERIC S. SCHMITT  
Attorney General

State of Montana  
AUSTIN KNUDSEN  
Attorney General

/s/ Dean John Sauer (with permission)  
Dean John Sauer  
Counsel of Record for the  
State of Missouri  
Office of the Missouri Attorney  
General  
Supreme Court Building  
207 W. High Street  
P.O. Box 899  
Jefferson City, MO 65102  
Telephone: (573) 751-3321  
Facsimile: (573) 751-2203  
John.sauer@ago.mo.gov

/s/ Aislinn W. Brown (with permission)  
Aislinn W. Brown  
Assistant Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401  
Telephone: (406) 444-2026  
aislinn.brown@mt.gov

*Attorneys for Plaintiff State of Montana*

*Attorneys for Plaintiff State of Missouri*

State of Nebraska  
DOUGLAS J. PETERSON  
Attorney General

State of Nevada  
AARON FORD  
Attorney General

/s/ Justin D. Lavene (with permission)  
Justin D. Lavene  
Assistant Attorney General  
Dave Bydalek  
Deputy Attorney General  
2115 State Capitol Building  
P.O. Box 98920  
Lincoln, NE 68509-8920  
Telephone: (402) 471-2682  
Facsimile: (402) 471-3297  
justin.lavene@nebraska.gov

/s/ Kathryn Armstrong (with permission)  
Kathryn Armstrong  
Deputy Attorney General  
Office of the Attorney General  
100 North Carson Street  
Carson City, NV 89701  
Telephone: (775) 684-1224  
Facsimile: (775) 684-1108  
karmstrong@ag.nv.gov

*Attorneys for Plaintiff State of Nevada*

*Attorneys for Plaintiff State of  
Nebraska*

State of South Dakota  
JASON R. RAVNSBORG  
Attorney General

/s/ Charles D. McGuigan (with permission)

Charles McGuigan  
Chief Deputy Attorney General  
Office of the Attorney General  
1302 E. Highway 14, Suite 1  
Pierre, SD 57501-8501  
Telephone: (605) 773-3215  
Facsimile: (605) 773-4106  
Charles.McGuigan@state.sd.us

*Attorneys for Plaintiff State of South Dakota*

State of Wyoming  
BRIDGET HILL  
Attorney General

/s/ James C. Kaste (with permission)

James C. Kaste  
Senior Assistant Attorney General  
Wyoming Attorney General's Office  
2320 Capitol Avenue  
Cheyenne, WY 82002  
307-777-6946 (phone)  
307-777-3542 (fax)  
James.Kaste@wyo.gov

*Attorneys for Plaintiff State of Wyoming*

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September 2021, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF electronic filing system, which will send an electronic copy of this filing to all counsel of record.

*s/ Paul M. Seby*

Paul M. Seby